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In The

Supreme Court of the United States

October Term, 1991

MICHAEL R. CAPIZZI, individually as District Attorney, and on behalf of the PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF ORANGE,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal Of California, Fourth Appellate District, Division Three

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

TODAY, MORE THAN 95% OF ALL FELONY CRIMINAL CASES IN CALIFORNIA AND NATIONWIDE ARE RESOLVED WITHOUT TRIAL, BY PLEAS OF GUILTY. IN VIEW OF THIS FACT, THE FEDERAL QUESTIONS PRESENTED ARE:

1. WHETHER THE POLICY OF THE CALIFORNIA COURTS REQUIRING THE PARTIES IN CRIMINAL ACTIONS TO ATTEND AND PARTICIPATE IN OFF-THE-RECORD, COURT-SUPERVISED PLEA NEGOTIATIONS IN FELONY CASES BEHIND DOORS CLOSED TO THE PUBLIC VIOLATES THE PEOPLE'S QUALIFIED RIGHT OF ACCESS TO CRIMINAL PROCEEDINGS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

2. WHETHER THE POLICY OF THE CALIFORNIA COURTS REQUIRING PETITIONER, UNDER THREAT OF SANCTIONS, TO ATTEND AND PARTICIPATE IN OFF-THE-RECORD, COURT-SUPERVISED PLEA DISCUSSIONS IN FELONY CASES BEHIND DOORS CLOSED TO THE PUBLIC, PREVENTING PUBLIC SCRUTINY OF THE DISCHARGE BY PETITIONER OF HIS PROSECUTORIAL DUTIES, VIOLATES PETITIONER'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

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Petition For Writ Of Certiorari To The Court Of Appeal Of California, Fourth Appellate District, Division Three

PETITION FOR WRIT OF CERTIORARI

Michael R. Capizzi, individually as District Attorney for the County of Orange, California, and on behalf of the People of the State of California, respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the California Court of Appeal, Fourth Appellate District, Division Three in this case. The courts below have determined they are empowered to compel the parties in criminal cases, under threat of sanctions, to participate in off-the-record felony plea negotiations with the court in closed session, barring public access, in contravention of petitioner's rights under the First and Fourteenth Amendments to the United States Constitution. Petitioner comes before this Honorable Court "as a representative of the people" whose responsibility as a public prosecutor "encompasses a duty to

protect the societal interest" in open criminal proceedings. *Gannett Co. v. DePasquale*, 443 U.S. 368, 384, fn. 12, 99 S.Ct. 2898, 61 L.Ed.2d 608, 624, fn. 12 (1979).

OPINIONS BELOW

No opinion has been reported in this case. However, the order of the Superior Court of the State of California for the County of Orange denying petitioner's motion for public "access to court-supervised plea bargain hearings" is reproduced as Appendix A. That court's Statement of Reasons for its ruling is set forth in Appendix B. The Court of Appeal of the State of California, Fourth Appellate District, Division Three, issued an order denying petitioner's petition for writ of mandate (Appendix C), and the California Supreme Court denied review (Appendix D).

JURISDICTION

The order of the Superior Court here at issue was entered in case number M-6591 on January 25, 1991. Petitioner's petition for writ of mandate was timely filed on February 11, 1991, case number G010685, and denied by the Court of Appeal on February 28, 1991. A petition for discretionary review was filed by petitioner in the California Supreme Court within the time permitted on March 11, 1991, case number S019934, and denied on April 18, 1991.

This petition, filed pursuant to 28 U.S.C. section 2101 (d) and rule 13 (1) of the Rules of the United States Supreme Court within 90 days of the April 18, 1991, order denying review, is also timely. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

The federal issues involved in this case include whether the public has a First Amendment right of access to the court-supervised process by which more than 95% of all felony criminal cases are resolved. The First Amendment, as made applicable to the States through the Fourteenth Amendment,

guarantees, in pertinent part, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. . . . "

In addition, petitioner asks this Court to consider whether the denial of public access to the aforementioned process, which prevents the public from observing the discharge by petitioner of his public duties, violates the Fourteenth Amendment which provides, inter alia, " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Department 5 is the criminal court in the Orange County Superior Court system that handles all felony case arraignments for the county. The presiding judge of that department is the supervising judge of all the county criminal courts. On January 9, 1991, a changing of the guard took place which saw the installation of a new presiding judge in Department 5, the Honorable John J. Ryan. Immediately upon assuming office, the judge initiated a policy of conducting daily off-the-record felony plea discussions with counsel in his private chambers with a view toward resolving cases there (R.T. 2:17-18).[1/2] Since January 9, 1991, these ongoing felony case negotiations have been closed to the public over petitioner's continuing objection.[3]

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[1] The designation "R.T." refers to the certified Reporter's Transcript of the January 9, 1991, proceedings in Department 5.

[2] As will be discussed, *infra*, more than 95% of all felony case dispositions in Orange County and throughout the nation each year result from guilty pleas.

[3] Petitioner's objection was joined by two interested newspapers, the *Los Angeles Times* (The Times Mirror Company) and the *Orange County Register* (Freedom Newspapers, Inc.), based primarily on First Amendment grounds. The trial court assigned the controversy a case number, accepted written motions and related documents for filing and heard arguments from petitioner and the press concerning its policy of closure. The court also heard arguments supporting its policy from the Orange County Public Defender's Office, which also filed an amicus brief supporting its position.

Prior to January 1991, when discussions between the court and counsel concerning the disposition of pending felony charges were had, they generally were held on the record[4] and in the open courtroom where any interested member of the public, including the press, could see and hear the proceedings. The genesis of this former practice can be traced back at least to June 8, 1982, when the People of California adopted Proposition 8 – an initiative entitled "The Victims' Bill of Rights." In that initiative the people found expression for their frustration with California's criminal justice system which, they believed, unjustly favored those accused to the detriment of the victims of crime.[5] Convinced that judges and attorneys, including prosecutors, were harming the community by entering into secret plea agreements, trading light sentences for early and easy case dispositions,[6] the voters

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[4] i.e., recorded by a court reporter.

[5] Proposition 8 added the present section 28 to the California Constitution. In subsection (a), "The People of the State of California [found] and declare[d] that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights, is *a matter of grave statewide concern.*

The rights of victims pervade the criminal justice system, encompassing not only the right to restitution from the wrongdoers for financial losses suffered as a result of criminal acts, but also the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance. [¶] . . .

To accomplish these goals, broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons are necessary and proper as deterrents to criminal behavior and to serious disruption of people's lives." (Emphasis added.)

[6] For example, in the California Ballot Pamphlet issued prior to the June 8, 1982, election date by California Secretary of State March Fong Eu, at 35, Paul Gann, a proponent of the Victims' Bill of Rights, wrote in support of Proposition 8: "[*People*] . . . are not only victims of crime, they *are victims of our criminal justice system* – the liberal reformers, *lenient judges* and behavior modification do-gooders who release hardened criminals again and again . . . . It's time to restore justice to the system." (Emphasis added.)

completely prohibited plea bargaining[7] in cases involving what the initiative labelled "serious felonies."[8]

On June 24, 1982, in direct response to the passage of Proposition 8, Cecil Hicks, then the District Attorney in Orange County, distributed a policy statement to his deputies designed to implement the will of the voters and address the public's underlying distrust of the criminal justice system. Recognizing that people find it difficult "to accept what they are prohibited from observing,"[9] the District Attorney forbad his deputies from engaging in secret, closed-door negotiations to resolve felony cases. The District Attorney's policy required that, "where discussions between defense counsel, judge and [prosecutors] relating . . . to potential sentence[s] would otherwise be permissible" after Proposition 8, his deputies were to take part in such discussions only in open court and on the record where their actions and comments would be subject to public scrutiny.[10]

From at least October 9, 1986, until the first week of January 1991, implementation of the District Attorney's policy was facilitated by the procedures followed in the superior court. The Honorable Myron S. Brown, the presiding judge of

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[7] Section 7 of Proposition 8 added section 1192.7 to the California Penal Code. Subsection (b) of section 1192.7 expansively defines "plea bargaining" as "any *bargaining, negotiation*, or *discussion* between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge *relating* to any charge against the defendant or *to the sentencing of the defendant*." (Emphasis added.)

[8] The term "serious felony" was defined in California Penal Code section 1192.7, subdivision (c).

[9] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572, 100 S.Ct. 2814, 65 L.Ed.2d 973, 986 (1980) (plurality opn.).

[10] The District Attorney's policy memorandum is published verbatim as "Appendix A" to *Bryce v. Superior Court*, 205 Cal.App.3d 671, 680, 252 Cal.Rptr. 443, 449 (1988), review denied. The policy was reviewed and restated by District Attorney Hicks in a second memorandum dated October 9, 1986. There, the District Attorney affirmed, "The disposition of felony cases is the public's business and must be conducted in public." See *id.*, 205 Cal.App.3d at 673, 252 Cal.Rptr. at 444.

Department 5 until January 7, 1991, was of the opinion that judges "could not force . . . prosecutors in chambers to discuss case settlement."[11/12] Accordingly, if a felony case was discussed during Judge Brown's tenure in Department 5, the discussion was generally held in open court and on the record, in public view.[13] *Nearly 15,000* felony pleas resulted from these *public* plea discussions over the period from October 1986 through December 1990. (See Record, Declaration of Jack W. Sullens, p. 2.)

When, on January 9, 1991, the new presiding judge announced his intention to eliminate public access to all court-supervised plea discussions as a matter of court policy, petitioner, along with counsel for the Times Mirror Company and Freedom Newspapers, Inc., filed written objections to the new procedure. On January 25, 1991, a hearing was duly held on petitioner's objections in Department 5 before Judge Ryan. As the representatives of the people, petitioner[14] and the news

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[11] So wrote Judge Brown in a letter addressed to the justices of the California Court of Appeal during the litigation of *Bryce v. Superior Court*, *supra*; the letter is published as "Appendix B" in *Bryce*, 205 Cal.App.3d at 681, 252 Cal.Rptr. at 450.

[12] Judge Brown's view was in accord with California law. See, e.g., *People v. Orin*, 13 Cal.3d 937, 943, 120 Cal.Rptr. 65, 533 P.2d 193 (1975); and *People v. Cimarusti*, 81 Cal.App.3d 314, 323, 146 Cal.Rptr.421 (1978): the right to *negotiate* felony case dispositions belongs *exclusively* to the prosecution, *not* the court.

[13] Although the open court, on-the-record procedure utilized by Judge Brown was challenged by the Orange County Public Defender in *Bryce v. Superior Court*, *supra*, the merits of that procedure were never decided by the Court of Appeal. *Bryce*, 205 Cal.App.3d at 675, 252 Cal.Rptr. at 445-446. Instead, the Court of Appeal expressed concern that Judge Brown *appeared* to be discussing cases in open court and on the record solely because of the District Attorney's policy memorandum. Since no litigant should control the methods by which a court handles its cases, the Court of Appeal issued a writ of mandate directing Judge Brown to initiate a procedure of his own choosing. In response to the peremptory writ, he did. The open court, on-the-record discussions continued as before.

[14] To quote one of the footnotes from the majority opinion in *Gannett Co. v. DePasquale*, *supra*, 443 U.S. at 384, fn. 12, 99 S.Ct. 2898, 61 L.Ed.2d at 624, fn. 12, "The Court has recognized that a prosecutor," such as

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media argued, inter alia, that court-supervised plea negotiations are a critical stage of criminal proceedings at which the people have a qualified right of access under the First Amendment to the United States Constitution. Petitioner also argued closed-door negotiations with the court violate the People's right to due process of law. These (and other related) objections were overruled, and petitioner's "motion for public access to the court-supervised plea bargain hearings" was denied.

Petitioner then applied for a writ of mandate from the California Court of Appeal; however, the writ was summarily denied, the court citing *Bryce v. Superior Court*, *supra*, 205 Cal.App.3d 671, 675, fn. 1.[15] Following the Court of Appeal's denial of the writ, discretionary review was denied by the

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petitioner here, " 'is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not [to] win a case, but [to ensure] justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law. . . . ' *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314. *The responsibility of the prosecutor as a representative of the public surely encompasses a duty to protect the societal interest in an open trial.*" (Emphasis added.)

[15] In "footnote 1" of *Bryce*, *supra*, 205 Cal.App.3d at 675, fn. 1, 252 Cal.Rptr. at 446, fn. 1, without considering or citing case or other supporting authority, the Court of Appeal referred to the public's "right to know" what goes on in the criminal justice system as "obvious hokum." Despite this rather offhand remark, the court made it clear it was *not deciding the merits* of the open-court policy. *Bryce*, *supra*, 205 Cal.App.3d at 675, 252 Cal.Rptr. at 445-446. That determination it expressly reserved for future litigation, such as this. The court indicated that, "if necessary and appropriate in the future," it would review a procedure petitioner considered constitutionally infirm so long as that procedure was selected by the presiding judge in the exercise of his discretion, "uncoerced by the demands of any litigant." *Id.*, 205 Cal.App.3d at 677, 679, 252 Cal.Rptr. at 446-447, 448. (See fn. 13, *supra*.) Here, however, where petitioner accepted the Court of Appeal's explicit invitation to seek relief from a court-selected policy he considers unconstitutional, the Court of Appeal has inexplicably denied his petition, citing simply its unsupported dictum from *Bryce* that the public's right of access is, "as a general proposition, 'obvious hokum.' " *Id.*, 205 Cal.App.3d at 675, fn. 1, 252 Cal.Rptr. at 446, fn. 1. (See Appendix C.)

California Supreme Court. Thus, this Honorable Court is the *only* court that can give vitality to the public access and due process rights of petitioner and the people of California under the First and Fourteenth Amendments. Unless this Court acts, the people once again will find it difficult "to accept what they are prohibited from observing."[16]

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION GUARANTEES THE PEOPLE AND THEIR REPRESENTATIVES A QUALIFIED RIGHT OF ACCESS TO CRIMINAL PROCEEDINGS AND PROVIDES A PRESUMPTION OF OPENNESS.

A. THIS COURT HAS FOUND A QUALIFIED RIGHT OF PUBLIC ACCESS TO CRIMINAL PROCEEDINGS IN THE FIRST AMENDMENT AND MADE THAT RIGHT APPLICABLE TO THE STATES.

When, in *Gannett Co., Inc. v. DePasquale*, *supra*, 443 U.S. 368, 379-380, 99 S.Ct. 2898, 61 L.Ed.2d 608, 621 (1979), the majority of this Court concluded the right to a public trial under the Sixth Amendment is personal to one accused, it left open the question of whether the people have a complementary right of access under the First and Fourteenth Amendments. *Id.*, 443 U.S. at 392, 99 S.Ct. 2898, 61 L.Ed.2d at 629. That issue was addressed the following term in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980).

In *Richmond Newspapers*, the defendant in the underlying criminal action faced his fourth trial on a charge of murder. His third had ended in a mistrial, apparently because a newspaper story about his first two trials was disseminated throughout the jury venire. Before the fourth trial began, in

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[16] *Richmond Newspapers*, *supra*, 448 U.S. at 572, 100 S.Ct. 2814, 65 L.Ed.2d at 986 (plurality opn.).

order to avoid a recurrence of the problem, defendant's counsel moved without objection that the proceedings be closed to the public. Defendant's motion was granted, and a subsequent motion by Richmond Newspapers to vacate the closure order was denied.

Defendant's trial commenced the following day with the public excluded. At the conclusion of the Commonwealth's case, the trial court granted a defense motion to strike the state's evidence and, having done so, found the defendant not guilty of murder. After the defendant was discharged, Richmond Newspapers successfully moved the trial court for an order allowing it to intervene in the case nunc pro tunc. The newspaper's petition for extraordinary relief was thereafter denied by the Virginia Supreme Court; however, this Court granted certiorari to decide "whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution." *Id.*, 448 U.S. at 558, 100 S.Ct. 2814, 65 L.Ed.2d at 978.

Although unable to settle on an opinion, seven of the eight justices participating in the *Richmond Newspapers* decision agreed the trial court's order closing its proceedings violated the public's right to attend criminal trials implicit in the First Amendment and made applicable to the States through the Fourteenth. *Id.*, 448 U.S. at 580, 100 S.Ct. 2814, 65 L.Ed.2d at 991-992 (plurality opn.); 448 U.S. at 585, 100 S.Ct. 2814, 65 L.Ed.2d at 994-995 (Brennan, J., concurring in judgment); 448 U.S. at 599, 100 S.Ct. 2814, 65 L.Ed.2d at 1004 (Stewart, J., concurring in judgment); 448 U.S. at 604, 100 S.Ct. 2814, 65 L.Ed.2d at 1007-1008 (Blackman, J., concurring in judgment).

The majority of the Court determined that a public right of access to criminal trials, while not expressly guaranteed by the First Amendment, is, as Chief Justice Burger wrote for the plurality, "indispensable to the enjoyment of rights explicitly defined." *Id.*, 448 U.S. at 580, 100 S.Ct. 2814, 65 L.Ed.2d at 991. Accordingly, the open and public nature of criminal trials was found "assured by the amalgam of the First Amendment guarantees" of speech, press and assembly. *Id.*, 448 U.S. at 577, 100 S.Ct. 2814, 65 L.Ed.2d at 989-990.

With the exception of the dissent, the various opinions of the justices appear to recognize a core purpose behind the First Amendment of ensuring "freedom of communication on matters relating to the functioning of government." *Id.*, 448 U.S. at 575, 100 S.Ct. 2814, 65 L.Ed.2d at 988 (plurality opn.); 448 U.S. at 592, 100 S.Ct. 2814, 65 L.Ed.2d at 1000 (Brennan, J., concurring in judgment). And, as the plurality opined, "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Id.*, 448 U.S. at 575, 100 S.Ct. 2814, 65 L.Ed.2d at 988.

Both the plurality opinion and Justice Brennan's opinion concurring in the judgment surveyed the historical backdrop of the Bill of Rights and found from "early times, although great changes in courts and procedure took place, one thing remained constant: the public character of the trial at which guilt or innocence was decided." *Id.*, 448 U.S. at 566, 100 S.Ct. 2814, 65 L.Ed.2d at 983 (plurality opn.). Having demonstrated a lengthy tradition of public access to English and American trials over the centuries, Justice Brennan observed, "Such abiding adherence to the principle of open trials 'reflect[s] a profound judgment about the way in which law should be enforced and justice administered.' *Duncan v. Louisiana* [391 U.S. 145, 155, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).]" *Id.*, 448 U.S. at 593, 100 S.Ct. 2814, 65 L.Ed.2d at 1000 (Brennan, J., concurring in judgment).

The plurality added that openness serves essential functions in the criminal justice system. It fosters an appearance of fairness and discourages perjury, misconduct by participants and decisions based on secret bias and partiality. In addition, open proceedings protect the judge from imputations of dishonesty and serve to educate the public. *Id.*, 448 U.S. at 569, 100 S.Ct. 2814, 65 L.Ed.2d at 984-985. Finally, the plurality identified an important effect of an open courtroom; public access, it explained, provides "an outlet for community concern, hostility, and emotion" so necessary in a civilized society. *Id.*, 448 U.S. at 571, 100 S.Ct. 2814, 65 L.Ed.2d at 986. The Chief Justice eloquently concluded:

> "The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.' [Citations.] *It is not enough to say that results alone will satiate the natural community desire for 'satisfaction.'* A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. *To work effectively . . . society's criminal process [must] 'satisfy the appearance of justice,' Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954), *and the appearance of justice can best be provided by allowing people to observe it*[;] . . . [I]t is difficult for [the people] to accept what they are prohibited from observing." *Id.*, 448 U.S. at 571-572, 100 S.Ct. 2814, 65 L.Ed.2d at 986 (emphasis added).

In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982), a majority of this Court reaffirmed the public access doctrine articulated in *Richmond Newspapers* in the context of a trial for the rape of three girls under the age of 18. Pursuant to the requirements of a Massachusetts state statute, the trial judge ordered the press and general public excluded from the courtroom during the trial. Globe Newspaper attempted to intervene in the proceedings to assert a right of access, but its motion was denied. Globe immediately sought injunctive relief from a justice of the Supreme Judicial Court of Massachusetts, but after a hearing, relief was again denied. An appeal to the full court followed; however, by the time the appeal was filed, the defendant's trial had proceeded, resulting in an acquittal.

Nevertheless, the Supreme Judicial Court of Massachusetts elected to decide the case, finding the issues significant and capable of repetition yet evading review. Without passing on Globe's constitutional claims, the Supreme Judicial Court construed its state statute requiring closure as mandatory, but requiring closure of sex offense trials only when minor victims testify. This Court vacated that judgment

and remanded the matter for consideration anew in light of *Richmond Newspapers*. On remand, while acknowledging the tradition of openness in criminal trials, the Massachusetts court reasoned an exception was appropriate in cases involving sexual assaults because of the unusually sensitive nature of sex-related crime and the special needs of its victims.

On Globe's second appeal, this Court reversed, explaining that "the circumstances under which the press and public can be barred from a criminal trial are limited." *Globe Newspaper, supra*, 457 U.S. at 606, 102 S.Ct. 2613, 73 L.Ed.2d at 257. Although the Court agreed that safeguarding the physical and psychological well-being of a minor is a compelling interest, it found that interest insufficient to justify closure without a case-by-case determination as to whether closure is absolutely necessary. *Id.*, 457 U.S. at 607-608, 102 S.Ct. 2613, 73 L.Ed.2d at 258.

In 1984, this Court announced two decisions which extended the public access doctrine of *Richmond* and *Globe*. In *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) [*Press-Enterprise I*], the Court described a tradition of openness in jury selection dating back to the 16th century. Using essentially the same sources and rationale set forth in *Richmond Newspapers* and again in the *Globe Newspaper* case, the Court held the public has a right of access to voir dire proceedings under the First Amendment.

In *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed 2d 31 (1984), a unanimous court considered whether an accused's right to a public trial under the Sixth Amendment "extends beyond the actual proof at trial" and, specifically, to a pretrial motion to suppress evidence. *Id.*, 467 U.S. at 44, 104 S.Ct. 2210, 81 L.Ed.2d at 37. Although the Court had never before addressed the issue of public access beyond the trial itself in Sixth Amendment terms, it reasoned "that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." *Id.*, 467 U.S. at 46, 104 S.Ct. 2210, 81 L.Ed 2d at 38. Accordingly, the Court looked to

Richmond Newspapers, *Globe Newspaper* and *Press-Enterprise I* to guide its analysis.[17]

Once again, the Court reviewed the rationale for public trials and found the benefits of openness equally applicable to suppression hearings. In fact, the Court opined that hearings on motions to suppress evidence are often just as important as trials themselves because, in many cases, "the suppression hearing [is] the *only* trial" before a defendant pleads "guilty pursuant to a plea bargain," *Waller*, *supra*, 467 U.S. at 46-47, 104 S.Ct. 2210, 81 L.Ed.2d at 39, and the *only* opportunity for public scrutiny of the police and prosecutor. *Id.*, 467 U.S. at 47, 104 S.Ct. 2210, 81 L.Ed.2d at 39. Consequently, in finding an accused has a right to a public suppression hearing, the Court held that, under the Sixth Amendment, any closure of such a hearing over an accused's objection "must meet the tests set out in Press-Enterprise [I] and its predecessors." *Ibid.*

Finally, in 1986, this Court decided *Press-Enterprise v. Superior Court*, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 [*Press-Enterprise II*], extending further the public's First Amendment right of access to a preliminary hearing. In *Press-Enterprise II*, one Diaz, a nurse, was charged in the underlying case with murdering 12 patients by illegally administering massive doses of lidocaine. Diaz moved that his preliminary hearing be closed to the public to protect his right to a fair trial. The magistrate granted his unopposed motion, finding closure necessary due to the extensive coverage the case had received in the national media. Following a 41-day preliminary hearing, Press-Enterprise requested a copy of the reporter's transcript. The magistrate refused to release the transcript and ordered the record sealed.

Subsequently, the State moved the trial court to release the transcript of Diaz's preliminary hearing to the public, but

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[17] The Court also noted that in *Gannett Co. v. DePasquale*, *supra*, though the issue was never actually decided, a majority of the justices agreed the public has a qualified constitutional right to attend pretrial suppression hearings. The justices disagreed, however, on the constitutional source of that right. *Waller*, *supra*, 467 U.S. at 45, 104 S.Ct. 2210, 81 L.Ed.2d at 37.

the court denied the motion, finding "a reasonable likelihood that release . . . might prejudice defendant's right to a fair and impartial trial." *Id.*, 478 U.S. at 5, 106 S.Ct. 2735, 92 L.Ed.2d at 8. Successively, Press-Enterprise Company filed petitions for writs of mandate in the Court of Appeal and the California Supreme Court. Both were denied. California's high court issued an opinion, however, on its denial of the writ, holding there is no general First Amendment right of access outside the context of an actual criminal trial. *Ibid.*, citing *Press-Enterprise Co. v. Superior Court*, 37 Cal.3d 772, 782, 209 Cal.Rptr. 360, 691 P.2d 1026, 1032 (1984). Furthermore, the court utilized the "reasonable likelihood" test employed by the trial judge in determining whether defendant's right to a fair trial would be substantially prejudiced.

Granting certiorari, this Court reversed, instructing that "the First Amendment question cannot be resolved solely on the label . . . give[n] the event, i.e., 'trial' or otherwise." *Press-Enterprise II*, 478 U.S. at 7, 106 S.Ct. 2735, 92 L.Ed.2d at 9. On the contrary, the event itself must be examined to ascertain "whether the place and process have historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.*, 478 U.S. at 8, 106 S.Ct. 2735, 92 L.Ed.2d at 10. Consequently, a court must determine whether opening the process will " 'enhance . . . the appearance of fairness so essential to public confidence in the system.' [Citation.]" *Id.*, 478 U.S. at 9, 106 S.Ct. 2735, 92 L.Ed.2d at 10.

Applying these considerations to California preliminary hearings, the Court concluded a First Amendment right of public access exists. The Court noted the "tradition of accessibility to preliminary hearings of the type conducted in California," *id.*, 478 U.S. at 10, 106 S.Ct. 2735, 92 L.Ed.2d at 11, and emphasized that "the preliminary hearing is often the final and most important step in the criminal proceeding." *Id.*, 478 U.S. at 12, 106 S.Ct. 2735, 92 L.Ed.2d at 12-13. Because the preliminary hearing often provides the only opportunity for the public to evaluate the manner in which a case is

handled,[18] the Court held that public access to such proceedings is essential to the appearance of fairness. Therefore, this Court determined a preliminary hearing may not be closed unless specific findings are made demonstrating a "substantial probability" that a fundamental-right will be unduly prejudiced and that no reasonable alternative to closure can adequately protect the right in issue. *Id.*, 478 U.S. at 13-14, 106 S.Ct. 2735, 92 L.Ed.2d at 13-14.

B. OTHER COURTS HAVE FURTHER EXTENDED THE PUBLIC'S QUALIFIED RIGHT OF ACCESS UTILIZING THE FIRST AMENDMENT ANALYSIS OF THIS COURT.

In *United States v. Criden*, 675 F.2d 550, 557 (3d Cir. 1982), the Third Circuit Court of Appeals held the public has a First Amendment right of access to pretrial suppression, due process and entrapment hearings. In so holding, the court acknowledged that, "at common law, the public apparently had no right to attend pretrial criminal proceedings," and "there was no counterpart at common law to the modern suppression hearing." *Id.*, 675 F.2d at 555. Nevertheless, the court noted that "the relative importance of pretrial procedure to that of trial has grown immensely in the last two hundred

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[18] On June 5, 1990, California voters went to the polls once again and made significant changes to state law in the area of criminal procedure. These and other changes were, again, necessitated by the voters' belief that "the rights of crime victims are too often ignored by our courts and our State Legislature," thus demanding reform by the voters themselves, Proposition 115, section 1 [preamble]. Among the changes mandated by the people in Proposition 115 was the addition of article 1, section 14.1 to the California Constitution, prohibiting the postindictment preliminary hearings required by the California Supreme Court in *Hawkins v. Superior Court*, 22 Cal.3d 584, 150 Cal.Rptr. 435, 586 P.2d 916 (1978). Furthermore, the voters added article 1, section 30, subdivision (b) to the State Constitution, which permits the admission of hearsay evidence at preliminary hearings, thus limiting the occasions for the kind of extensive and revealing cross-examination previously associated with preliminary hearings in California. See *Press-Enterprise II*, *supra*, 478 U.S. at 4, 106 S.Ct. 2735, 92 L.Ed.2d at 7. One significant effect of these constitutional restrictions has been to reduce dramatically the quantum of informaion available to the public through the preliminary hearing. The importance of plea discussions has therefore increased exponentially.

years," thus meriting an evaluation "in light of current values and conditions, see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386-95, 89 S.Ct. 1794, 1804-09, 23 L.Ed.2d 371 (1969)." *Ibid.*

So considered, the court concluded the lack of traditional openness was not dispositive in determining whether pretrial proceedings are subject to a public right of access. *Ibid.*[19] What the *Criden* court *did* find controlling, however, was the "public's *vital interest in evaluating the public officials* who work in the criminal justice system." *Id.*, 675 F.2d at 557, emphasis added. That vital interest, wrote the court, "cannot be fully vindicated unless the public and press can attend pretrial hearings. *Otherwise, much of the work of prosecutors and trial judges may go unscrutinized.*" *Ibid.*, emphasis added.

A similar analysis was applied with regard to forms used under the Criminal Justice Act, 18 U.S.C. section 3006A (CJA), for approving payments to court-appointed counsel and experts in *United States v. Suarez*, 880 F.2d 626 (2d Cir. 1989). There, the court conceded, "It is true that there is no long 'tradition of accessibility' to CJA forms. See *Press-Enterprise II*, 478 U.S. at 10, 106 S.Ct. at 2741. *However, that is because the CJA itself is, in terms of tradition, a fairly recent development*, having been enacted in 1964." *Id.*, 880 F.2d at 631, emphasis added. The court therefore concluded:

> "The lack of 'tradition' with respect to the CJA forms does not detract from the public's strong interest in how its funds are being spent . . . . Because there is no persuasive reason to ignore the

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[19] The Court of Appeals' analysis foreshadowed that of this Court in *Waller v. Georgia, supra*, in one important respect. In *Waller*, this Court held an accused is entitled under the Sixth Amendment to a public suppression hearing even though a "tradition of openness" was never discussed or demonstrated. Cf. *Gannett Co. v. DePasquale, supra*, 443 U.S. at 387-391, 99 S.Ct. at 2909-2911, 61 L.Ed.2d at 626-628, *and see Press-Enterprise II, supra*, 478 U.S. at 10, fn.3, 106 S.Ct. 2735, 92 L.Ed.2d at 11-12, fn.3, where this Court approvingly acknowledged, "Other courts have noted that some pretrial proceedings have no historical counterpart, but given the importance of the pretrial proceeding to the criminal trial, the traditional right of access should still apply. [Citations.]"

> presumption of openness . . . , we conclude the public has a qualified First Amendment right of access to the CJA forms after payment has been approved." *Ibid.*

In *Seattle Times Co. v. United States District Court*, 845 F.2d 1513 (9th Cir. 1988), the Ninth Circuit considered whether the public has a right of access to pretrial detention and release proceedings and related documents. Following the pattern of analysis developed in this Court's precedents, the Ninth Circuit court first considered whether the proceedings were historically open to the public. Finding "[p]retrial detention hearings do not share with criminal trials an unbroken history of public access," the court nonetheless noticed that "[p]retrial proceedings have grown increasingly important in the modern era" (citing *United States v. Criden, supra*, 675 F.2d at 555.) *Seattle Times, supra*, 845 F.2d at 1516. "Under these circumstances," the court reasoned that "the historical tradition surrounding bail proceedings is much less significant." *Ibid.*

Turning to the question of "whether public access plays a particularly significant role in the actual functioning of the proceeding," the *Seattle Times* panel noted, "public interest in the conditions of pretrial release is understandably great because the community is directly affected." *Ibid.* The court "agree[d] with the First and [Fifth] Circuits that pretrial release proceedings implicate the related policy concerns of a public educated in the workings of the justice system and a system subjected to healthy public scrutiny." *Ibid.*, citing *In re Globe Newspaper Co.*, 729 F.2d 47, 51-52 (1st Cir. 1984) and *United States v. Chagra*, 701 F.2d 354, 363 (5th Cir. 1983). Accordingly, the public's right of access prevailed.

The public right of access has also been found to apply to plea hearings and sentencing hearings. In deciding *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986), the Fourth Circuit Court of Appeals mused that both types of hearings appear to "fall within the scope of the right of access to criminal *trials*, which is clearly guaranteed by *Richmond Newspapers* and *Globe Newspaper Co.*" *Id.*, 807 F.2d at 389. The court explained, "Because the taking of a guilty plea

serves as a substitute for a trial, it may reasonably be treated in the same manner as a trial for First Amendment purposes." *Ibid.*, emphasis added. Cogently, the court concluded,

> "Sentencings have historically been open to the public; while plea hearings do not have the same long tradition, they are typically held in open court. As to both, *public access serves the important function of discouraging either the prosecutor or the court from engaging in arbitrary or wrongful conduct.* The presence of the public operates to check any temptation that might be felt by either the prosecutor or the court to obtain a guilty plea by coercion or trick, or to seek or impose an arbitrary or disproportionate sentence." *Ibid.* (Emphasis added.)

The reasoning of *Washington Post, supra*, was adopted by the Second Circuit in *United States v. Haller*, 837 F.2d 84 (2d Cir. 1988), which agreed public access to plea hearings facilitates essential "public scrutiny of the conduct of courts and prosecutors." *Id.*, 837 F.2d at 87. Additionally, *Haller* contributed the crucial observation, "[T]he taking of a plea is the most common form of adjudication of criminal litigation. See *Brady v. United States*, 397 U.S. 742, 752, 90 S.Ct. 1463, 1471, 25 L.Ed.2d 747 (1970) (well over three-fourths of criminal convictions rest on guilty pleas)." *Ibid.*[20]

In *Oregonian Publishing Co. v. United States District Court*, 920 F.2d 1462 (9th Cir. 1990), the Ninth Circuit similarly reasoned that, because "the plea agreement takes the place of the criminal trial," the First Amendment right of access applicable at trial "should exist in the context [where] most criminal prosecutions are resolved, the plea agreement." *Id.*, 920 F.2d at 1465. To hold otherwise, the court wrote, "would effectively block the public's access to a significant

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[20] As will appear, *infra*, the proportion of guilty pleas to jury trials in Orange County Superior Court felonies and felonies nationwide has consistently been greater than the estimate reported in *Brady*.

segment of our criminal justice system," *ibid.*, and frustrate the purposes of the First Amendment.[21]

II. THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION GUARANTEES THE PEOPLE AND THEIR REPRESENTATIVES A QUALIFIED RIGHT OF ACCESS TO COURT-SUPERVISED PLEA DISCUSSIONS. ACCORDINGLY, THE POLICY OF THE CALIFORNIA COURTS REQUIRING PETITIONER TO PARTICIPATE IN SUCH DISCUSSIONS OFF THE RECORD AND BEHIND DOORS CLOSED TO THE PUBLIC VIOLATES THE FIRST AMENDMENT.

In assessing whether the public enjoys a right of access to a particular criminal proceeding, this Court has considered two basic inquiries: first, whether the place and process have historically been open to the public; and second, whether public access plays a significant positive role in the functioning of the particular process in question. *Press-Enterprise II*, *supra*, 478 U.S. at 8, 106 S.Ct. 2735, 92 L.Ed.2d at 9-10. Applying these considerations to the case at hand, it appears manifest the public is guaranteed a qualified right of access to court-supervised plea discussions by the First and Fourteenth Amendments to the United States Constitution.

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[21] Also see *Washington Post v. Robinson*, ___ F.2d___, 59 U.S.L.W. 2694 (D.C. Cir. 1991), a case of first impression in the District of Columbia Circuit, where the Court of Appeals follows *Oregonian Publishing*, *supra*, *Haller*, *supra*, and *In re Washington Post*, *supra*, in extending the public's right of access to a plea agreement. Cf. *United States v. Kooistra*, 796 F.2d 1390, 1391 (11th Cir. 1986). As regards the extension of a public right of access in other settings, see, e.g., *United States v. Brooklier*, 685 F.2d 1162, 1167, 1170 (9th Cir. 1982) [voir dire and motions to suppress]; *Associated Press v. United States District Court*, 705 F.2d 1143, 1145-1147 (9th Cir. 1983) [pretrial documents]; *CBS, Inc. v. United States District Court*, 765 F.2d 823, 825 [post-conviction documents]; *United States v. Danovaro*, 877 F.2d 583, 589 (7th Cir. 1989) [transcript of guilty plea]; *In re Charlotte Observer*, 882 F.2d 850, 852, 856 (4th Cir. 1989) [change of venue motion]; *In re Globe Newspaper Co.*, 920 F.2d 88, 93-94 (1st Cir. 1990) [names of trial jurors]; and *State v. McDougald*, 38 N.C.App. 244, 248 S.E. 2d 72, 84 (1978) [plea discussions in chambers].

A. THE HISTORY OF PLEA DISCUSSIONS

Although court-supervised plea discussions are a relatively modern phenomenon in the criminal justice system, the impact and importance of such pretrial procedures have increased dramatically over the years. See *Press-Enterprise II, supra*, 478 U.S. at 10, fn. 3, 106 S.Ct. 2735, 92 L.Ed.2d at 11-12, fn. 3. Whereas, in centuries past, various forms of trial were the preferred method for resolving criminal controversies, today the guilty plea has come to the fore.

In *Brady v. United States, supra*, 397 U.S. at 752, fn. 10, 90 S.Ct. 1463, 25 L.Ed.2d at 758-759, fn. 10, the Court noted, "It has been estimated that . . . between 70% and 85% of all felony convictions are [obtained] . . . by guilty plea. [Citation.]" In recent years, however, the percentages have been *even higher*. According to the United States Department of Justice Bureau of Justice Statistics, "Guilty pleas are the most common disposition of a felony case"; a jurisdictional median of about 5% of all felony cases go to trial nationwide. *Report to the Nation on Crime and Justice*, 2d ed., pp. 83-84 (1988).

The California Judicial Council reports, "The data indicate . . . almost all convictions (95% or more) result from pleas of guilty or nolo contendere." *Sentencing Practices Quarterly*, No. 52, p. 5 (June 1991). And based upon available figures supplied by the Orange County Clerk to the Judicial Council, *guilty pleas have accounted for approximately 96.6% of all felony case resolutions in the county since the beginning of 1984*.[22] Thus, the importance of guilty pleas

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[22] In 1984, 4098 of 4245 Orange County felonies (96.54%) were resolved by guilty pleas; 147 were tried by juries. In 1985, 176 jury trials were conducted, while 4611 of the total 4787 felonies (96.32%) resulted in guilty pleas. 5789 of 6009 cases (96.34%) were concluded by pleas of guilty in 1986 and 220 by jury trial. 1987 saw 5677 of 5932 felony cases (95.7%) end in guilty pleas, with 255 jury trials. In 1988, 7859 felonies were settled by guilty plea out of a total of 8043 cases (97.71%); 184 jury trials were held. Guilty pleas determined 5245 of 5441 felonies (96.4%) in 1989, and only 196 felonies were decided by juries. In 1990, 234 juries tendered verdicts to the court, but 6006 of 6240 felonies (96.25%) were resolved by defendants pleading guilty. And during the first four months of 1991, there have been 2154 guilty pleas, 53 jury trials and thus, out of the total of 2207 felonies, 97.6% have been resolved by way of a guilty plea.

and the court-supervised process through which such pleas are obtained is apparent. As the Court of Appeals concluded in *Seattle Times Co. v. United States District Court, supra*, "Under these circumstances, the [concern for discerning an] historical tradition" should be "much less significant." *Id.*, 845 F.2d at 1516. Cf. *Press-Enterprise II, supra*, 478 U.S. at 10, fn. 3, 106 S.Ct. 2735, 92 L.Ed.2d at 11-12, fn. 3; *United States v. Criden, supra* 675 F.2d at 555; and *United States v. Suarez, supra*, 880 F.2d at 631.

On the other hand, *if* there *is* a tradition for how plea discussions have been handled in Orange County, that tradition has been one of openness, not of secrecy. Beginning in 1982, when the voters passed Proposition 8 and then Orange County District Attorney Cecil Hicks first announced his plan to help restore public confidence in the system by refusing to negotiate felony cases behind the public's back,[23] the policy of openness began to take root. And from October 9, 1986, until January 1991, when respondent opted to resolve cases with counsel in private, discussions concerning felony case dispositions were generally held in open court and on the record, subject to public scrutiny. See *Bryce v. Superior Court, supra*, 205 Cal.App.3d at 681, 252 Cal.Rptr. at 450. And the system worked.[24] Certainly this " '[period] of accessibility implies the favorable judgment of experience.' " *Press-Enterprise II, supra*, 478 U.S. at 8, 106 S.Ct. 2735, 92 L.Ed.2d at 10, quoting *Globe Newspaper, supra*, 457 U.S. at 605, 102 S.Ct. 2613, 73 L.Ed.2d at 256, in turn quoting *Richmond Newspapers, supra*, 448 U.S. at 589, 100 S.Ct.

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[23] See footnotes 5 and 6 and text at footnote 10, *supra*.

[24] The figures in footnote 22, *supra*, give at least some indication that the percentage of felony cases resolved by plea does not change significantly depending on whether public access is granted or denied. The import of this is that *public access does not disrupt the movement of cases*. If the public is present during plea discussions, the system still manages to move cases in an efficient manner. It should also be noted that the discussion of felony cases in public has not in any way affected the number of jury trials held over the years. For example, according to reports maintained by the Judicial Council of California, there were 232 felony jury trials in Orange County in 1976. There were 234 in 1990. Over the years, the figures have remained relatively static.

2814, 65 L.Ed.2d at 997 (Brennan, J., concurring in judgment).

B. THE NEED TO RESTORE PUBLIC ACCESS TO PLEA DISCUSSIONS WITH THE COURT.

Writing for the majority in *Globe Newspaper Co. v. Superior Court, supra*, 457 U.S. at 604-605, 102 S.Ct. 2613, 73 L.Ed.2d at 255-256, Justice Brennan reflected upon the broad principles underlying the public's First Amendment right of access. Drawing from *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 16 L.Ed.2d 484, 488 (1966), he explained,

> " '[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.' . . . By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government. [Citations.] Thus to the extent that the First Amendment embraces a right of access to criminal trials, it is *to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one.*" (Emphasis added.)

If, indeed, people are entitled, as a matter of federal constitutional law, to engage in an *informed* discussion about the manner in which their judicial system operates in resolving crime, then they *must* be allowed to observe how judges and counsel interact in the process of discussing potential felony pleas. If "the integrity and quality of what takes place"[25] in the system is, as this Court has repeatedly held, *dependent* upon the public's presence at trials, where only a relatively trifling percentage of felony cases are resolved in these modern times, then how much more dependent must the

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[25] *Richmond Newspapers, supra*, 448 U.S. at 578, 100 S.Ct. 2814, 65 L.Ed.2d at 990 (plurality opn.).

system be upon the public's watchful eye in the context of court-led plea discussions![26]

Where private plea negotiations occur between a prosecutor and a defense attorney, as they do in many jurisdictions, such discussions are *voluntary* and subject to a court's objective scrutiny and on-the-record approval. See, e.g., *Ricketts v. Adamson*, 483 U.S. 1, 9, fn. 5, 107 S.Ct. 2860, 97 L.Ed.2d 1, 11, fn. 5 (1987), citing *Mabry v. Johnson*, 467 U.S. 504, 508, 104 S.Ct. 2543, 81 L.Ed.2d 437, 443 (1984). Such negotiations between the parties have received the express approval of this Court since 1970, *Brady v. United States, supra*, 397 U.S. at 753, 90 S.Ct. 1463, 25 L.Ed.2d at 759, and the California Supreme Court since *People v. West*, 3 Cal.3d 595, 604-608, 91 Cal. Rptr. 385, 477 P.2d 409 (1970). But where a judge, as a matter of policy, interjects the *court* into closed-door negotiations in an effort to settle felony cases, especially over a party's objection, as here, the discussions take on a *coercive* air that breeds suspicion, no matter how honest and scrupulous the participants may be.

Because the public has a surpassing interest in evaluating public officials (*United States v. Criden, supra*, 675 F.2d at 557) and discouraging both the prosecutor and the court from engaging in arbitrary or wrongful conduct against the public interest (*In re Washington Post, supra*, 807 F.2d at 389), public access to court-supervised plea discussions is essential. What this Court said about California's preliminary hearing as it existed before the constitutional restrictions of Proposition 115 (see fn. 18) now must be said with regard to court-supervised plea discussions:

> "[They are] often the final . . . step in the criminal proceeding [and they] provide[ ] 'the sole occasion

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[26] Not every guilty plea is the result of court-supervised plea discussions. Defendants plead guilty for a variety of reasons, based upon their own choices and the advise of their attorneys. *However*, under respondent's present policy, all cases set for arraignment are discussed by the court with counsel for the parties in chambers, and a significant number of guilty pleas are entered at the time of arraignment. At the very least, this leaves the public with the impression that secret "deals" are being struck behind closed doors, thus contributing to the appearance of impropriety.

> for public observation of the criminal justice system.' [Citation.] [¶] . . . [T]he absence of a jury, long recognized as 'an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge,' [citation] makes . . . public access . . . even more significant. 'People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.' *Richmond Newspapers*, 448 U.S. at 572, 100 S.Ct. 2814, 65 L.Ed.2d 973." *Press-Enterprise II*, 478 U.S. at 12-13, 106 S.Ct. 2735, 92 L.Ed.2d at 12-13.

During the January 9, 1991, proceedings in Department 5 at which respondent announced its intention to initiate a policy of holding private plea discussions with counsel off the record, the court found that no public right of access to plea discussions exists. Respondent indicated that, if a plea agreement is reached in chambers, a subsequent recitation of its terms is all the law requires (Appendix B). However, a synoptic revelation to the public *after* the fact concerning "what went on" in chambers in an unrecorded discussion between a judge and counsel is inadequate to meet the First Amendment standard.

In the Charlotte Observer's suit for access to the motion for a change of venue brought by Evangelist James Bakker in his prosecution by the government (*In re Charlotte Observer, supra*, 882 F.2d 850), the magistrate decided that, under the First Amendment, public disclosure of the basis for his ruling on the venue motion and of the proceedings themselves could be postponed until after a trial jury was selected. On the Charlotte Observer's petition for mandamus relief, the Fourth Circuit Court of Appeals insightfully recognized:

> "[W]e perceive in the magistrate's assessment a basic misapprehension and undervaluation of the core first amendment value at stake. . . . In the magistrate's expressed view, the only effect of his closure order . . . was a 'minimal delay' in access to the materials upon which a judicial decision was

> made and to the judicial reasoning behind the decision. This unduly minimized the value of '*openness*' itself, a value which *is threatened whenever immediate access to ongoing proceedings is denied, whatever provision is made for later public disclosure.*" *In re Charlotte Observer, supra*, 882 F.2d at 856, emphasis added.

As this Court explained in *Press-Enterprise I, supra*, 464 U.S. at 508, 104 S.Ct. at 823, 78 L.Ed.2d at 637, "the value in openness lies in the fact that people . . . can have confidence that standards of fairness are being observed; the sure knowledge that anyone can attend gives assurance that established procedures are being followed and that deviations will become known." Public confidence, therefore, *depends upon* public access, especially in an atmosphere in which the system itself has been the object of public ridicule.[27] "It is *not enough* to say that *results alone* will satiate the natural community desire for 'satisfaction.' " *Richmond Newspapers, supra*, 448 U.S. at 571, 100 S.Ct. 2814, 65 L.Ed.2d at 986 (plurality opn.), emphasis added.

III. REQUIRING PETITIONER TO ATTEND AND PARTICIPATE IN COURT-SUPERVISED PLEA DISCUSSIONS IN FELONY CASES BEHIND CLOSED DOORS AND OFF THE RECORD PREVENTS PUBLIC SCRUTINY OF PETITIONER'S PERFORMANCE OF HIS DUTIES, THEREBY UNDERMINING PUBLIC CONFIDENCE IN HIS OFFICE. ACCORDINGLY SUCH A REQUIREMENT IS NOT ONLY VIOLATIVE OF THE PUBLIC'S RIGHT OF ACCESS UNDER THE FIRST AMENDMENT, IT VIOLATES PETITIONER'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Since the publication of *Bryce v. Superior Court, supra*, and the California Supreme Court's subsequent denial of

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[27] See footnotes 5, 6 and 18, *supra*, which discuss the expressed reasons impelling California voters to pass Propositions 8 and 115.

review in that case, petitioner and his deputies have been *required* to attend and participate in court-supervised plea discussions in the trial courts. While the appellate panel in *Bryce* expressly reserved ruling on the merits of an open-court policy, it went on at length to provide a discourse on the prosecutor's "duty" to attend and "participate in the process of disposing [cases] short of trial." *Bryce, supra,* 205 Cal.App.3d at 676, fn. 2, 252 Cal. Rptr. at 446, fn.2. The court adjured, "[T]he prosecut[or] *may not refuse* to participate," and "cannot withhold pertinent information and his own views concerning settlement in an effort to prevent a defendant from pleading guilty and seeking the mercy of the court." *Ibid.*, emphasis added. But *see Weatherford v. Bursey,* 429 U.S. 545, 561, 97 S.Ct. 837, 51 L.Ed.2d 30, 43 (1977).

Because plea discussions were *open* to the public when *Bryce* was handed down, the impact of the court's discussion was initially insignificant. But the court's comments were like a land mine waiting to be tripped. When respondent initiated its policy of discussing felony case dispositions in *closed* session, petitioner suddenly had a "duty" to go with the judge into a back room, out of public view, and "participate" in the negotiation of felony cases by "sharing pertinent information and his own views" concerning settlement. It was at this point petitioner's federal consitutional claims arose.

Although the right to *negotiate* a guilty plea belongs *exclusively* to petitioner as the representative of the people, *People v. Orin, supra,* 13 Cal.3d at 942-943, 120 Cal.Rptr. 65, 533 P.2d 193; *People v. Cimarusti, supra,* 81 Cal.App.3d at 323, 146 Cal.Rptr. 421, following the California Supreme Court's denial of review in *Bryce, supra,* petitioner had no choice but to submit to the trial judge's pleasure by attending court-supervised plea discussions. However, now that the trial court has decided to hold its negotiating sessions behind a "wall of silence," *Sheppard v. Maxwell,* 384 U.S. 333, 349, 86 S.Ct. 1507, 16 L.Ed.2d 600, 613 (1966), and out of public view, much more is at stake than petitioner's rights under the state constitutional and statutory provisions discussed in *Bryce.*

Remembering that "[t]he responsibility of the prosecutor as a representative of the public . . . encompasses a duty to protect the societal interest in an open trial," *Gannett Co. v. DePasquale, supra*, 443 U.S. at 384, fn. 12, 99 S.Ct. 2898, 61 L.Ed.2d at 624, fn. 12, and in the openness of equivalent proceedings, see, e.g., *Press-Enterprise II, supra*, 478 U.S. at 7, 106 S.Ct. 2735, 92 L.Ed.2d at 9, petitioner has steadfastly objected to respondent's policy prohibiting public access to plea discussions between the court and counsel since the closed-door procedure was announced. At the same time, however, under the compulsion of *Bryce, supra*, petitioner and his deputies have been required to attend and participate in those plea discussions under threat of "appropriate sanctions." *Bryce, supra*, 205 Cal.App.3d at 679, 252 Cal. Rptr. at 448.

Petitioner is, thus, in an intolerable dilemma, between the proverbial rock and hard place. Unless this Court compels respondent to give effect to "the presumption of openness" in the context of its plea discussions with counsel, given the predisposition of the Court of Appeal that the notion of public access is "obvious hokum," *Bryce, supra*, 205 Cal.App.3d at 675, fn. 1, 252 Cal.Rptr. at 446, fn. 1, petitioner will be helpless to prevent the trammelling of the First Amendment despite his "duty" and "responsibility" under *Gannett*. Accordingly, a grant of certiorari by this Court is imperative.

In *Stein v. New York*, 346 U.S. 156, 197, 73 S.Ct. 1077, 1099, 97 L.Ed. 1522, 1549 (1952), overruled on other grounds in *Jackson v. Denno*, 378 U.S. 368, 391, 84 S.Ct. 1774, 12 L.Ed.2d 908, 923-924, the Court acknowledged that "[t]he people of the state are also entitled to due process of law." Here, that right to due process is being violated on a daily basis when, under threat of sanctions, petitioner is constrained to turn his back on the public he represents.

While this Court has undeniably expressed its approval of plea bargaining between *the parties* to a criminal action, see *Ricketts v. Adamson, supra*, 483 U.S. at 9, fn. 5, 107 S.Ct. 2860, 97 L.Ed.2d at 11, fn. 5, citing *Mabry v. Johnson, supra*, 467 U.S. at 508, 104 S.Ct. 2543, 81 L.Ed.2d at 443; *Bordenkircher v. Hayes*, 434 U.S. 357, 361-363, 98 S.Ct. 663, 54

L.Ed.2d 604, 609-610 (1978); *Chaffin v. Stynchcombe*, 412 U.S. 17, 31, fn. 18, 93 S.Ct. 1977, 36 L.Ed.2d 714, 726, fn. 18 (1973); *Santobello v. New York*, 404 U.S. 257, 260-261, 92 S.Ct. 495, 30 L.Ed.2d 427, 432 (1971), it has *never* approved a process of felony case disposition in which the judge is a central player, compelling the parties to negotiate.[28] On the contrary, the Court has made clear:

> "[T]here is no constitutional right to plea bargain; *the prosecutor need not do so if he prefers to go to trial*. It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty." *Weatherford v. Bursey, supra*, 429 U.S. 545, 561, 97 S.Ct. 837, 51 L.Ed.2d 30, 43 (1977), emphasis added.

To the same effect, the California Supreme Court has explained that a plea bargain "contemplates an agreement *negotiated by the People and the defendant* and approved by the court." *People v. Orin, supra*, 13 Cal.3d at 942, 120 Cal.Rptr. 65, 533 P.2d 193, emphasis added. That approval power, however, does not give a court "authority to substitute itself" as the people's representative in order to dispose of felony cases over prosecutorial objection. *Id.*, 13 Cal.3d at 943, 120 Cal.Rptr. 65, 533 P.2d 193.

> "Such judicial activity would . . . detract from the judge's ability to remain detached and neutral in evaluating the voluntariness of the plea and the fairness of the bargain to society as well as to the defendant, and would present *a substantial danger of unintentional coercion* of defendants who may be intimidated by the judge's participation in the matter. [Citation.]" *Ibid.*, emphasis added.

Thus, by supervising closed, off-the-record discussions designed to obtain guilty pleas, respondent risks the "substantial danger of unintentional coercion of defendants." By the same token, respondent invades petitioner's right to decide whether a case should be negotiated or go to trial. Moreover,

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[28] Cf. Federal Rules of Criminal Procedure, rule 11, subdivision (e), which provides with regard to plea discussions, "The court *shall not* participate in any such discussions." (Emphasis added.)

by compelling petitioner to attend and participate in conferences which violate the public's right of access, thus impairing the ability of the public to develop an *informed* opinion concerning the manner in which petitioner is discharging his duties as an elected government prosecutor, respondent deprives petitioner of the public's confidence and approval. Such a situation cannot be consistent with the process due petitioner and the people of the State of California under the Fourteenth Amendment's due process clause.

CONCLUSION

The fundamental rights of the people to speak and assemble freely under the First Amendment find their origin in the founders' solemn concern that the public discussion of governmental affairs be open, informed, and unimpeded. This Court has found a public right of access *essential* to effectuate the meaningful public dialogue contemplated by the First Amendment in the context of certain criminal proceedings, particularly criminal trials. Today, however, criminal trials represent less than 5% of all the felony case dispositions achieved annually in California and across the country; the remaining cases are resolved by a trial *substitute*: the *guilty plea*. The public's interest in open plea discussions between the court and counsel for the parties is, therefore, clear and substantial.

Consequently, the time has come for this Court to acknowledge the reach of the First Amendment into the court-supervised process by which the overwhelming majority of crimes are resolved. What the Court recognized in *Wood v. Georgia*, 370 U.S. 375, 391, 82 S.Ct. 1364, 8 L.Ed.2d 569, 581 (1962), remains true today: "The administration of the law is not the problem of the judge or prosecuting attorney alone, . . . [it] necessitates the active cooperation of an enlightened public." Cf. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839, 98 S.Ct. 1535, 56 L.Ed.2d 1, 10 (1978). But the "cooperation" and "enlightenment" to which this court referred in *Wood v. Georgia, supra*, cannot be achieved where courts attempt to do justice "in a corner,"

behind "walls of silence." As this Court has repeatedly recognized, people find it difficult to accept what they are prohibited from observing. Surely access to the court-supervised process by which over 95% of felony criminal cases are resolved is not beyond their reach!

In order to ensure the central purpose of the First Amendment is not lost amid present day innovations in the criminal justice system, and in order to safeguard the people's right to due process of law, this Honorable Court must intervene. Accordingly, and for all the above reasons, petitioner respectfully prays that this Court grant the writ of certiorari.

DATED this 17th day of July, 1991.

Respectfully submitted,

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County of Orange, State of California
MAURICE L. EVANS, Chief Assistant
District Attorney
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APPENDIX A

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE

MINUTE ORDER

DEPT. 5 DATE: 1/25/91

JUDGE: JOHN J. (JACK) RYAN CLERK: Terri Walsh

BAILIFF: Victor Quiros REPORTER: Betsy Quinn

CASE: M-6591

In the matter of People's Objection to Closed, Unreported Disposition hearing.

HRG. RE: Motion for Access to Court-Supervised Plea Bargain Hearings.

(x) PEOPLE REP. BY Wallace Wade, D.A.

Appearances:
Mark Wray/Duffern H. Helsing – Freedom Newspapers, INC.
dba: The Orange County Register
Thomas Havlena, Public Defender's Office
Karlene Goller – The Times Mirror Company
Atty. Laurence A. Young – (case #C-82361)

(x) ALL COUNSEL STIPULATE TO PROCEED UNDER #M-6591.

(x) People's motion to strike declaration of PD Michael McClellan – Denied.

(x) People's request to call PD McClellan to testify re his declaration – DENIED.

(x) Copy of letter dated 1/24/91 from "MADD" to Judge John J. Ryan is received and ordered filed this date.

(x) Motion for access to Court-Supervised Plea Bargain Hearings – DENIED.

ENTERED 1/25/91

APPENDIX B

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

DEPARTMENT 5

IN RE: THE MATTER OF) PEOPLE'S OBJECTION TO) CLOSED, UNREPORTED) DISPOSITION HEARINGS.) _____)	CASE NO. M 6591 Statement of Reasons for Decision

HONORABLE JOHN J. RYAN, JUDGE PRESIDING

REPORTER'S TRANSCRIPT

JANUARY 9, 1991

APPEARANCES OF COUNSEL

FOR THE PEOPLE:
MICHAEL CAPIZZI, DISTRICT ATTORNEY
BY: WALLACE WADE, DEPUTY

ALSO PRESENT:
MARK WRAY,
ORANGE COUNTY REGISTER

BETSY QUINN, CSR #4910
OFFICIAL COURT REPORTER

This court has not found any case, statute, or constitutional provision which requires that discussions which could lead to a possible resolution of a criminal case be in public and recorded by a court reporter.

The law is clear, however, that if a resolution has been achieved, the terms of such resolution must be made public and recorded by a court reporter.

Most pre-plea discussions are, and should be, between the attorneys representing the opposing sides. These conversations are by telephone, in the prosecutor's office, in the courthouse cafeteria, in vacant jury rooms, and other practical places. The public is never invited to listen in, nor is the public informed.

Most criminal cases are resolved without the necessity of a trial. One of the purposes of having conversations early, is to determine whether a case can be resolved short of expensive pre-trial motions and trial. If it can, both parties want to know before a plea is entered, whether the court will accept the agreement. In those situations where the parties are only able to achieve a partial agreement, they want to know what the punishment or range of punishment may be. That requires a discussion between both sides and the court. These conversations could include privileged, quasi-privileged, or sensitive matters that either or both sides don't want to make public prior to trial. If there is such a dialogue, and if a resolution is reached, then the agreement, and the reasons for the agreement, will be made public and placed on the record. The victim of any crime, of course, must also be notified and given the right to appear *before* any agreement is finalized. (See Section 1191.1 P.C.)

The case decisions which appropriately criticize "private" resolutions of criminal cases, involve situations where the agreement and reasons for such agreement are not made public and are not placed on the record. *Oregonian Publishing Co. v. US District Court For The District Of Oregon*, is such a case. With the policy now being adopted by this judge, the only "secret agreements," whether expressed

or implied, will be those made between the prosecutor and defendant but not revealed to the court.

There does not appear to be a First Amendment right of access to pre-plea discussions. The test for determining whether there is was discussed by the United States Supreme Court in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-9 (*Press-Enterprise II*).

1. Whether the type of proceeding at issue has traditionally been conducted in an open fashion.

The answer to the first question is obvious. Pre-plea discussions have traditionally been conducted in private, and many case decisions recognize that fact.

2. Whether public access to the proceeding would play a significant positive role in the functioning of the particular process in question. Or, as stated in *Oregonian*: Would public access serve as a curb on prosecutorial or judicial misconduct or would it further the public's interest in understanding the criminal justice system.

Public disclosure of any agreement, and the reasons for the agreement satisfies all these legitimate concerns. (It may be noted that the the "Oregonian" Court may have even allowed portions of the agreement to remain sealed! See footnote 1.)

Pre-plea discussions in civil or criminal cases have never been considered a "sitting" as envisioned by Section 124 of the Code of Civil Procedure; nor are pre-plea discussions a "criminal action or proceeding" as contemplated by Section 269 of the Code of Civil Procedure.

It appears to this court, that *Bryce v. Superior Court*, 205 Cal.App.3d 671 was correctly decided.

APPENDIX C

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

THE PEOPLE, Petitioner, v. SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE, Respondent.	ORDER G010685 (Super. Ct. No. M-6591) FILED FEB. 28, 1991

THE COURT:*

The petition for a writ of mandate/prohibition is DENIED. (*Bryce v. Superior Court* (1988) 205 Cal.App.3d 671, 675, fn.1, review den.)

SILLS, P.J.
SILLS, Presiding Justice

*Before Sills, P.J., Crosby, J., and Wallin, J.

APPENDIX D

Fourth Appellate District, Division Three,
No. G010685
S019934

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
IN BANK

THE PEOPLE, Petitioner,

v.

FILED
APR. 18, 1991

ORANGE COUNTY SUPERIOR COURT,
Respondent.

Petition for review DENIED.

LUCAS
Chief Justice